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May 16, 1997

BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Petition for Rulemaking to Amend 47 C.F.R. § 76.1003

Dear Mr. Caton:

Enclosed please find the original and nine copies of the Petition for Rulemaking of Ameritech New Media, Inc. to amend 47 C.F.R. § 76.1003 -- Procedures for Ajudicating Program Access Complaints.

Please direct any questions that you may have to the undersigned.

Respectfully submitted,

Lawrence R. Sidman

Lawrence R. Sidman

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Petition for Rulemaking to Amend 47 C.F.R. § 76.1003-- Procedures for Ajudicating Program Access Complaints	)	CS Docket No. __-__

PETITION FOR RULEMAKING OF AMERITECH NEW MEDIA, INC.

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PETITION FOR RULEMAKING OF AMERITECH NEW MEDIA, INC.

Ameritech New Media, Inc. ("Ameritech"), pursuant to Section 1.401 of the Commission's rules,[1/] hereby submits this Petition for Rulemaking ("Petition") requesting that the Federal Communications Commission ("Commission") issue a Notice of Proposed Rulemaking to amend Part 76 of its rules, 47 C.F.R. § 76.1003, to improve the Commission's administration and enforcement of Section 628 of the Communications Act of 1934. The proposed narrowly targeted changes, applying only to proceedings initiated pursuant to Section 628, are needed to conform the Commission's rules to the procompetitve letter and spirit of the law, as enacted by Congress. Specifically, in all Section 628 proceedings, Ameritech proposes that there be: (1) guaranteed expedited review achieved by imposing a short deadline for decisions on complaints; (2) a right to discovery to

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1/ 47 U.S.C. § 1.401.

enable complainants to obtain the information needed to prove Section 628 violations; and (3) economic penalties in the form of fines or damages to create the needed economic disincentives to discourage violation of Section 628 by cable operators and programmers.

I. INTRODUCTION AND SUMMARY

During this decade, the Congress has devoted an enormous amount of time and productive effort to bring competition to the multichannel video programming distribution ("MVPD") marketplace and to restrain the price increases and improve the quality of service experienced by cable customers. In the 1992 Cable Act, Congress employed a mixture of rate regulation and the procompetitive provisions of Section 628 to achieve those goals. In the Telecommunications Act of 1996, Congress repealed the telephone company-cable cross-ownership prohibition in the hope of sparking competition to cable by local, wireline providers.

Notwithstanding these concerted efforts by the Congress, consumers continue to experience substantial cable rate increases, significantly exceeding the rate of inflation. Competitors to cable continue to encounter problems obtaining popular cable programming at nondiscriminatory prices, without which they are incapable of creating competitive programming offerings. Consequently, in 1997, there has been a resurgence of concern about the apparent intractability of the problems in the MVPD marketplace.

At an April 10, 1997 Senate Commerce Committee hearing on the status of competition in the video marketplace, Chairman John McCain (R-AZ.) and other committee members expressed clear disappointment and displeasure with the slow pace of development of genuine competition to cable. Chairman McCain concluded his opening statement with the following observation: "In sum, I remain concerned that competition in the multichannel video market today is not as vigorous as it will have to be to effectively constrain cable rates. Today, I hope to gain an insight on what must be done to assure that competition will measure up to the task by 1999." House Telecommunications, Trade and Consumer Protection Subcommittee Chairman Billy Tauzin (R-LA) recently announced that his Subcommittee also will hold a hearing on the status of competition in the video market.[2/]

During the past year, Ameritech has been doing its part to bring the type of robust, head-to-head competition to cable that Congress sought to achieve when it repealed the telephone company-cable cross-ownership prohibition in Section 651 of the Communications Act. Since its decision to provide video programming services subject to Title VI of the Communications Act, Ameritech has been busily engaged in building out digital state of the art cable systems and currently has franchises with 37 communities having a total population of more than 1.7 million people. From a public interest perspective, Ameritech's

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2/ See, John Mercurio, Big Cable Company Cuts Deal to Carry C-Span. The Network of Congress, Battered by Supreme Court Decision, Wins 100% Coverage on TCI, Roll Call, May 5, 1997.

competitive entry into the MVPD marketplace is yielding precisely the dividends consumers want and Congress expected when it enacted Section 651. For example, in Troy, Michigan, the monthly rate charged by the incumbent cable provider dropped from $28.08 to $23.95, a price decrease in excess of fifteen percent, after Ameritech entered the market. In the adjoining communities of Naperville and Aurora, Illinois, served by the same incumbent cable operator, cable prices of the incumbent cable operator in Naperville, where Ameritech is providing service, have remained the same, whereas cable prices in Aurora, not yet served by Ameritech, were increased earlier this year by 6.25%, more than double the rate of inflation. In community after community, Ameritech's entry into the MVPD market has triggered special offers by the incumbent cable provider, including discounts in promotional packages, free premium and pay-per-view channels, network upgrades and new channels, and upgraded converter boxes with interactive programming guides (IPG). In short, competition from Ameritech has translated directly and instantaneously into benefits for consumers.

Ameritech, however, has experienced and continues to experience difficulties in obtaining access to certain quality cable programming indispensable to its ability to compete effectively against incumbent cable operators. Of particular concern to Ameritech is its ability to obtain access to

attractive sports programming.[3/] These difficulties are not unique to Ameritech. Other potential competitors to incumbent cable operators have also expressed similar concerns in regard to obtaining sports programming on non-discriminatory terms. See, TELE-TV Reply Comments at 16 - 18, in the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming in CS Docket No. 96-133; Optel, Inc. Reply Comments in the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming in CS Docket No. 96-133; Bell Atlantic Video v. Rainbow Programming Holdings, Inc., CSR-4983-P (filed March 28, 1997 and still pending). Complaint at ¶ 13: "[r]egional sports programming is among the most watched and most desired cable television programming. Any multichannel service that does not offer this programming will be at a significant disadvantage in signing up customers and winning over viewers." These examples illustrate vividly that access to programming remains an unfulfilled goal for many MVPDs and that the work of Section 628 is far from finished.

3/ As a recent New York Times article observes, access to sports programming is considered critical to an MVPD's success, and Cablevision is convinced that its virtual monopoly on New York sports programming as well as its extremely strong position in regional sports programming across the nation will create endless new opportunities to make money. See Geraldine Fabrikant, As Wall Street Groans, A Cable Dynasty Grows, N. Y. Times, April 27, 1997, financial section at 1 and 8 attached hereto as Exhibit 1.

Section 628 was designed to rectify anticompetitive conduct by the cable industry by prohibiting a broad range of unfair or discriminatory practices in the sale of satellite cable and satellite broadcast programming.[4/] Section 628 was intended to supplement this nation's antitrust laws, providing competitors in the MVPD marketplace with a forum at the FCC to resolve expeditiously complaints about anticompetitive abuses.[5/] In particular, Section 628 (f)(1) explicitly calls for the expedited review of all program access complaints because Congress recognized that competition delayed was competition denied in this especially dynamic sector of the market. Congress understood that access to quality popular programming is essential to an MVPD's success and, in Sections 628(b) and (c), crafted powerful remedies to enable competitors to incumbent cable providers to obtain that programming on nondiscriminatory prices, terms and conditions. In Section 628(e), Congress gave the Commission a full panoply of enforcement tools to carry out the intent of Congress.

4/ "It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." See 47 U.S.C. § 548(b).

5/ See S. Rep. No. 102-92, 102nd Cong., 1st Sess. 29 (1991).

Based on its own experience[6/] with the FCC's rules implementing Section 628, 47 C.F.R. §§ 76.1000 et seq., and an analysis of the FCC's decisions in Section 628 proceedings, Ameritech believes that the FCC's procedural rules for handling Section 628 complaints are inconsistent with the procompetitive thrust of the substantive law of Section 628. In a number of mutually reinforcing ways -- the absence of a quick deadline for FCC decisions on Section 628 complaints, the failure to accord complainants a right to reasonable discovery and the failure to mandate economic penalties for violations of Section 628 -- the current FCC rules encourage defendants in Section 628 complaints to protract and manipulate the process without providing any disincentives for them to engage in such dilatory tactics. Delays in resolving meritorious Section 628 complaints correlate directly with delays in bringing the benefits of meaningful competition to consumers and thus contribute to the very problem identified by Members of Congress on a bipartisan basis.[7/]

6/ Ameritech already has concluded one Section 628 adjudicatory proceeding, another is pending, and it expects to file additional Section 628 complaints to vindicate its rights to obtain access to programming on nondiscriminatory prices, terms and conditions.

7/ In the common carrier context, the Commission already has recognized the need to improve the speed and efficiency of its formal complaint process if the goals of the Telecommunications Act of 1996 are to come to fruition. See, Implementation of the Telecommunications Act of 1996 (Amendment of Rules Governing Procedures to be Followed when Formal Complaints are Filed Against Common Carriers) in FCC 96-460, (Nov. 27, 1996) (Notice of Proposed Rulemaking in CC Docket No. 96-238) [hereinafter "Common Carrier Complaint NPRM"] citing S. Conf. Rep. No. 230, 104th Cong., 2nd Sess. (1996).

Specifically, the Commission can play a constructive role in accelerating the pace of real competition -- competition that actually restrains prices -- in the MVPD market by making just three basic changes to Section 628 procedural rules.[8/]

First, a short deadline for FCC decisions on Section 628 complaints is needed. Section 628 requires the expeditious resolution of program access complaint proceedings. However, the Commission's rules implementing Section 628 provide no time frame within which it is required to render decisions. Consequently, the average one year period for initial FCC decisions on Section 628 complaints does not afford complainants the "expedited review" mandated by statute. Such delays impede the development of competition in the MVPD market. Therefore, Ameritech respectfully urges the Commission to amend its rules to require a Commission decision in Section 628 proceedings within ninety days from the filing of the complaint in cases where there is no discovery and within one hundred fifty days from filing of a complaint in cases where there is discovery.[9/]

Second, in the furtherance of justice, the Commission should permit reasonable discovery as of right at the election of the complainant in Section 628 cases. Discovery is often vital to a

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8/ The text of the proposed amendments to 47 C.F.R. § 76.1003 is attached hereto as Appendix A.

9/ This time frame is consistent with the range of deadlines for complaint resolution mandated by the Congress in the Telecommunications Act of 1996 in connection with several types of common carrier disputes. See Common Carrier Complaint NPRM, at 5-6, ¶¶s 6-10.

complainant's ability to make its case. For example, it is virtually impossible to establish a price discrimination case, absent an admission by the defendant, without discovery of the rates, terms, and conditions a programmer is charging an incumbent cable operator or other MVPD. Congress intended Section 628 to be an accelerated and substantively more advantageous alternative for complainants to initiating an antitrust action for obtaining relief from anticompetitive practices.[10/] Just as discovery is integral to private antitrust actions, it is most important to ferreting out the facts in Section 628 proceedings. To be consistent with expedited Commission review, the time for conducting discovery should be limited.

Third, the Commission's rules should be amended to provide explicitly for the imposition of forfeitures and/or the award of damages for all Section 628 violations. Section 628 cannot realize its full potential as an antidote to anticompetitive behavior by cable operators and programmers unless there is a significant economic disincentive, i.e. fines and/or award of damages to complainants in addition to the equitable remedies, e.g. cease and desist, reformation, etc., provided by the rules. The absence of a monetary penalty is encouraging defendants in

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10/ For example, Section 628(b) is patterned after Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45); Section 628(c)(2)(B) is modeled after the Robinson-Patman Act Amendments to the Clayton Act (15 U.S.C. §§ (3 et seq.); and Sections 628(c)(2)(C) and (D) reflect a strengthening of Sherman Act protections (15 U.S.C. § 1).

Section 628 complaints to engage in dilatory tactics because there is no penalty for not resolving the complaints expeditiously. The unavailability of money damages leaves complainants uncompensated for injury suffered during the entire time they were suffering harm because of Section 628 violations. Forfeitures or damages should be assessed retroactive to the date of the notice of intent to file a complaint under Section 628. Such changes will foster robust competition in the video marketplace.

II. THE COMMISSION MUST AMEND ITS RULES TO PROVIDE FOR A SHORT DEADLINE FOR ISSUANCE OF DECISIONS ON SECTION 628 COMPLAINTS.

The 1992 Cable Act requires that: "[t]he Commission's regulations shall - (1) provide for an expedited review of any complaint pursuant to [Section 628]."[11/] In response, the Commission developed adjudicatory rules purporting to enable the Commission to settle uncomplicated complaints quickly while still resolving complex cases in a timely manner.[12/] Significantly, the Commission did not, however, create a time frame within which it is required to decide Section 628 cases.

Under the current rules, least ten (10) days prior to filing a Section 628 complaint, an aggrieved MVPD must provide

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11/ 1992 Cable Act § 628(f)(1); 47 U.S.C. § 548.

12/ Implementation of §§ 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 (Development of Competition and Diversity in Video Programming Distribution and Carriage), 8 FCC Rcd 3359, 3369-70 (1993) (First Report and Order in MM Doc. No. 912-265) (hereinafter "Program Access Order").

notice to the programming vendor or cable operator of its belief that behavior violating Section 628 has occurred.[13/] The Commission encourages program access dispute resolution through negotiations at this time because "[s]uch a policy favoring private settlement and alternative dispute resolution conserves Commission resources and is thus in the public interest."[14/] If the parties are unable or unwilling to resolve the dispute without Commission involvement, a complaint is then filed.

The rules create a fifty (50) day pleading cycle following complaints filed under Section 628.[15/] The defendant programming vendor or cable operator has thirty (30) days to file an answer. The complainant has twenty (20) days to file a reply pleading. The fifty (50) day pleading cycle is then closed and the Commission staff reviews the pleadings. Discovery is not permitted as a matter of right, but rather the need for discovery is determined by the Commission on a case-by-case basis.[16/] Ameritech is unaware of any instance in which the Commission has ordered discovery. The Commission may, in its discretion,

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13/ Id. at 3389. The notice must provide sufficient specificity so that the precise nature of the dispute can be determined by the vendor or cable operator.

14/ National Rural Telecommunications Cooperative, 10 FCC Rcd 9785 (1995).

15/ Program Access Order, 8 FCC Rcd at 3388-92.

16/ Program Access Order, 8 FCC Rcd at 3389. The Commission stated that it does not expect that non-price discrimination cases will present the need for discovery. Id. at 3422; see also 47 C.F.R. § 1.102(b).

request briefs, including proposed findings of facts and conclusions of law, from both parties.[17/] In such circumstances, reply briefs are to be filed within twenty (20) days thereafter.[18/] The staff then rules on the merits.[19/]

Experience demonstrates that it was a serious mistake not to set a deadline for FCC decision in Section 628 cases. The average length of time it takes the FCC to render a decision on a Section 628 complaint appears to be slightly more than one year.[20/] The longest time it has taken the FCC to decide a Section 628 complaint was over thirty-two months,[21/] while the shortest time was just under six months.[22/] More program access complaints have been settled than have gone to a decision on the merits. Interestingly, the average time to resolve Section 628 complaints through settlement has been almost thirteen (13)

17/ 47 C.F.R. § 1.1003(i).

18/ Id.

19/ Parties are free to file an application for review of the staff's determinations directly to the Commission. Program Access Order, 8 FCC Rcd at 3421.

20/ This conclusion is derived from a statistical analysis of nine Section 628 complaints decided on procedural or substantive grounds by the Commission.

21/ See, American Cable Company v. Telecable of Columbus, Inc., 11 FCC Rcd 10090 (1996) Memorandum Opinion and Order in CSR-4206; CSR 4198-P (complaint filed December 10, 1993, resulting in a 32 month and 19 days review process).

22/ Hutchens Communications, Inc. v. TCI Cablevision of Georgian, 9 FCC Rcd 4849 (1994) (complaint filed on March 8, 1994 resulting in a five (5) months and twenty-nine (29) days review process).

months, almost one month longer than the average time it takes the FCC to decide a Section 628 complaint on the merits.[23/]

This protracted period for program access complaint resolution, whether by FCC decision or settlement, does not afford the Congressionally mandated expedited review required by Section 628. The inordinately lengthy time for decision is particularly disappointing because it appears that there has been no discovery of which Ameritech is unaware in these Section 628 proceedings. Accordingly, the Commission staff has not been confronted with sifting through volumes of evidentiary material but has been deciding these cases on the pleadings. Moreover, it appears that no Section 628 cases have been referred to an administrative law judge, as contemplated by the Commission's rules in complicated cases. See 47 C.F.R. §76.1003(m). In light of the Commission's seemingly exclusive reliance on its most streamlined procedures for resolving Section 628 complaints, it is inexplicable why the average processing time should be anywhere near as long as it is.

The prejudice to both complainants and the development of competition in the MVPD market resulting from this inordinately long review time is demonstrable. Every day that Section 628 complainants are unable to obtain programming or are paying discriminatorily high prices for such programming is a day they are suffering competitive harm. As Section 628 itself

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23/ Based upon a review of the Commission's files, it appears that fifteen Section 628 complaints have been settled while only nine have gone to decision.

recognizes, their injury correlates directly with injury to competition because refusals to deal or price discrimination translate into less competitively attractive programming offerings. Moreover, delays in resolving Section 628 complaints create inordinate pressure on complainants to settle, perhaps on less favorable terms than they otherwise would, simply to improve their competitive position. For example, a complainant faced with a refusal to deal knowing that it likely will take more than a year to resolve its complaint, might be willing to settle by paying an excessive price for the programming as an alternative to not acquiring the programming at all.

To ameliorate the problems inherent in the current program access rules, the Commission should amend its rules to require that a decision on a Section 628 complaint must be rendered within ninety days of filing the complaint in cases where the complainant has elected not to take discovery and within one hundred fifty days of filing the complaint where there is discovery. This proposed change is completely consistent with the letter and spirit of the pending Common Carrier Complaint NPRM in which the Commission embraced the ninety to one hundred fifty day statutory deadlines established by Congress in the Telecommunications Act of 1996 for §§ 208(b), 260, 271 and 275 proceedings and proposed that expedited, streamlined procedures be applied across the board:

> We tentatively conclude that the pro-competitive goals and policies of the 1996 Act would be enhanced by applying the rules proposed in this Complaint NPRM to all formal complaints, not just those enumerated in the

> 1996 Act. Therefore, our goal in initiating this proceeding is to facilitate faster resolution of all formal complaints by eliminating or streamlining procedures and pleading requirements under our current rules.

Common Carrier Complaint NPRM, at 3, ¶2.

These proposed deadlines for Commission decision in Section 628 cases can be met without unduly straining Commission resources by requiring more complete information from the parties in their pleadings and requiring the parties to narrow and refine both the factual and legal issues in dispute to the maximum extent feasible prior to Commission decision.

Specifically, Ameritech proposes that answers to Section 628 complaints be filed within 20 days after the service of the complaint.[24/] Answers should be required to include copies of programming agreements and other documentary evidence of practices challenged in the Complaint.[25/] For example, in a Section 628 case alleging unlawful exclusivity or a refusal to deal, the contract(s) in question should be attached to the answer. In a case alleging price discrimination, the answer should include an attached copy of the contracts of all other cable operators serving the same area at issue and at least several representative contracts of an affiliated cable operator

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24/ A 20 day period for filing the answer is contemplated in the Common Carrier Complaint NPRM, at 20, ¶ 47.

25/ See Common Carrier Complaint NPRM, at 19, ¶ 45 (proposing that parties be required to append relevant tariffs or tariff provisions to their pleadings). If these programming agreements are considered proprietary, they may be submitted pursuant to protective order.

serving roughly the same number of subscribers. The time for filing a reply brief following the answer should be reduced to fifteen (15) days in cases where there is no discovery. Reply briefs following the answer should be eliminated where discovery is conducted. Within five days of the service of the answer, the FCC should convene a status conference to address all matters needed to prepare the record for decision. If the complainant elects discovery, which may be commenced at any time following the filing of a complaint, a discovery schedule should be adopted at the conference. Completion of all discovery and disposition of all discovery-related motions would be required within forty-five days following the status conference. Within twenty days following completion of discovery, both complainant and defendant would be required to submit briefs containing proposed findings of fact and conclusions of law,[26/] and, if possible, a joint stipulation of facts not in dispute. At the same time, they would be required to file any evidentiary exhibits. The parties would be permitted to file reply briefs within ten days of the service of the briefs containing proposed findings of fact and conclusions of law. At that juncture, the record would be deemed closed, giving the Commission ample time to render its decision within the proposed 150 day deadline for decision. Obviously, where the complainant does not elect to engage in discovery, forty-five days is shaved from the process and the record before the Commission is likely to be smaller and less complex. In that

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26/ See Common Carrier Complaint NPRM, at 18, ¶ 41.

circumstance, the Commission should be required to render its decision within ninety days from the filing of the Section 628 complaint.

Providing a deadline for completion of Section 628 Commission proceedings ensures fulfillment of the directive of Congress to resolve expeditiously all program access disputes. The elimination of delay in deciding meritorious Section 628 complaints will strengthen competitive programming offerings to consumers, leading to more robust competition and greater consumer choice in the MVPD market.

III. THE COMMISSION SHOULD AMEND ITS RULES TO ALLOW THE RIGHT TO DISCOVERY IN ALL SECTION 628 PROGRAM ACCESS COMPLAINT PROCEEDINGS.

When the Commission formulated program access rules it decided to adopt a system to promote resolution of as many cases as possible on the basis of a complaint, answer, and reply. 47 C.F.R. § 76.1003(b).[27/] Currently, discovery is not a matter of right in Section 628 proceedings. 47 C.F.R. § 76.1003(g). Rather the Commission staff makes a determination as to the appropriateness of discovery on a case-by-case basis. Id. However, a review of Section 628 cases indicates that apparently there has yet to be discovery ordered in a Section 628 adjudication.

When discovery is not routinely available, a complainant's ability to prove a Section 628 violation is dramatically reduced. A right to discovery is particularly important if a complainant

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27/ See also Program Access Order, 8 FCC Rcd at 3416.

is to have a reasonable likelihood of success in Section 628 price discrimination cases. Absent an admission by the defendant, it is extraordinarily difficult for a complainant to establish a price discrimination case, without discovery of the rates, terms, and conditions a programmer is charging an incumbent cable operator or other MVPD. Such a result is not what Congress envisioned when it directed the Commission to implement rules to ensure competition and diversity are realized in the MVPD market.

The Federal Rules of Civil Procedure provide for discovery as of right.[28/] There is no reason why that principle should not be followed in Section 628 cases. In fact, discovery is especially necessary in these proceedings. Extensive discovery is the hallmark of private antitrust actions. Certainly, reasonable discovery should be available in Section 628 complaints which are designed expressly to address the very same types of anticompetitive practices addressed by the antitrust laws.[29/] The mere awareness of the possibility of a right to discovery has a deterrent effect on those contemplating engaging in anticompetitive practices.

Accordingly, the Commission should amend its rules to provide for a right to a full range of discovery in all Section

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28/ Fed.R.Civ. P.26(b); See Oppenheimer Fund v. Sanders, 437 U.S. 340 (1978).

29/ The defendants would have a right to seek a protective order for documents containing proprietary or highly competitively sensitive information.

628 cases. Of course, the Commission itself would retain the right to require discovery in all Section 628 cases.[30/] As discussed above, to ensure compliance with its mandate to provide for expedited review, the Commission's rules should require that all discovery be concluded within forty-five (45) days following the initial status conference.

The Commission should vigorously enforce the right to discovery in Section 628 cases by punishing frivolous efforts to deny or obstruct discovery. To that end, it should, in addition to exercising its existing authority recently recognized by the Commission,[31/] amend its rules to incorporate the sanctions set forth in the Federal Rules of Civil Procedure.[32/]

IV. THE COMMISSION'S RULES SHOULD EXPRESSLY PROVIDE FOR THE LEVY OF FORFEITURES AND/OR AWARD OF DAMAGES FOR ALL SECTION 628 VIOLATIONS.

Congress sought vigorous enforcement of the important changes to substantive law embodied in Section 628. To that end, Congress gave the Commission plenary authority to provide for penalties under Section 628(e):

> "(1)...[T]he Commission shall have the power to order appropriate remedies, including, if necessary, the power to establish prices, terms, and conditions of sale of programming to the aggrieved multichannel video programming distributor."...

30/ The Commission staff has the authority to require discovery. Program Access Order, 8 FCC Rcd at 3392.

31/ See Common Carrier Complaint NPRM, at 24, ¶ 55.

32/ See, Fed. R. Civ. P. 37(b); Fed R. Civ. P. 11.

"(2) The remedies provided in paragraph (1) are in addition to and not in lieu of the remedies available under Title V or any other provision of this Act."

The Commission concluded that "this authority is broad enough to include any remedy the Commission reasonably deems appropriate, including damages."[33/] The Commission reasoned that nothing in the statute limits the Commission's authority to decide what constitutes an "appropriate remedy", and "damages" clearly come within the definition of "remedy".[34/] This interpretation of the breadth of remedial authority afforded to the Commission in Section 628 is consistent with its authority to award damages elsewhere in the Communications Act of 1934.[35/] Despite the Commission's expansive interpretation of the breadth of its authority, it declined, as a matter of prudence, to exercise its authority to award damages because it did not think it was necessary.[36/] However, the Commission reserved the right

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33/ Implementation of the Cable Television Consumer Protection and Competition Act of 1992 (Development of Competition and Diversity in Video Programming Distribution and Carriage), 10 FCC Rcd 1902, 1911 (1994) (Memorandum Opinion and Order on Reconsideration of the First Report and Order), [hereinafter "First Reconsideration Order"].

34/ Id. at 1910 (citing Black's Law Dictionary (4th ed. 1968)).

35/ The Commission has authority to award damages under Title II. Specifically, 47 U.S.C. § 209 states, "If, after hearing on a complaint, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act, the Commission shall make an order directing the carrier to pay the complainant the sum to which he is entitled . . . .". See also, Common Carrier Complaint NPRM, at 29-33, ¶¶s 63-69.

36/ First Reconsideration Order, 10 FCC Rcd at 1911.

to revisit this issue should it be brought to the Commission's attention that "the current processes are not working."[37/]

The mounting public frustration and accompanying Congressional concern about the unacceptably slow pace of the development of meaningful competition in the MVPD marketplace dictates that the time is now ripe for the Commission to revisit this issue. The Commission should amend its rules to provide economic disincentives, in the form of forfeitures and/or award of damages, for all violations of Section 628. The reason is simple: it is more profitable for cable operators and programming vendors to violate the law than to obey it.[38/]

Under current rules, as a matter of policy, the Commission has limited the penalties it imposes on violators of Section 628. With respect to prohibited exclusive agreements, the Commission "may order the vendor to make its programming available to the complainant on the same terms and conditions, at a nondiscriminatory rate, as given to the cable operator."[39/] In price discrimination cases, a vendor who engages in unlawful activity may be ordered "to revise its contracts to offer to the

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37/ Id. at 1911.

38/ In a high profile antitrust action, Bartholdi Cable Company alleged anticompetitive behavior (denial of access to Madison Square Garden Network) by Time Warner significantly delayed Bartholdi's entry into the New York City cable market and noted that Time Warner was required to make the programming available to Bartholdi only "[a]fter a lengthy and costly process in which many potential subscribers were lost." Bartholdi Cable Co. v. Time Warner, Inc., No. CV-96-2687 (E.D.N.Y. filed May 29, 1996) at ¶¶ 84-87, 88-91.

39/ Program Access Order, 8 FCC Rcd at 3392.

complainant a price or contract term in accordance with the Commission's findings."[40/] If the Commission only requires violators to comply prospectively with the law and fails to impose economic penalties, it is inevitable that cable operators or programming vendors will test the limits of the law.

An economic penalty in the form of a forfeiture and/or a damages award is needed to vindicate the strong public interest in curtailing anticompetitive conduct evident in Section 628. As indicated above, Section 628 is a unique provision of the Communications Act because it so clearly is modeled after antitrust law. Indeed, Congress intended that Section 628 serve as a cost-effective supplement to the antitrust laws because "companies...might be denied relief in light of the prohibitive costs of pursuing an antitrust suit."[41/] Aspiring competitors to incumbent cable operators should not be denied the opportunity to collect damages they would otherwise be entitled to collect under antitrust law merely because they seek relief under Section 628 to redress their specific anticompetitive concerns. Nor should incumbent cable operators go unpunished economically simply because they are fortuitous enough to be a defendant in a Section 628 proceeding as opposed to a defendant in an antitrust action instituted in federal court.

The imposition of monetary penalties retroactive to the date of filing the notice of intent to initiate a Section 628

40/ Id. at 3420.

41/ S. Rep. No. 92-102, 102nd Cong., 1st Sess. 29 (1991).